

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Petition of the Embarq Local Operating |) | |
| Companies for Forbearance Pursuant to |) | WC Docket No. 07-258 |
| 47 U.S.C. § 160(c) from the Contract Tariff |) | |
| Filing Requirements of the Pricing |) | |
| Flexibility Rules |) | |

OPPOSITION OF COMPTTEL

COMPTTEL respectfully submits these comments, pursuant to the Federal Communications Commission's ("Commission") *Public Notice* released on November 14, 2007 (DA 07-4617), and in response to the petition submitted by Embarq, on October 19, 2007, in the above-referenced docket. Embarq filed a petition for forbearance pursuant to section 10(c) of the Communications Act of 1934, as amended ("Section 10 of the Act"),¹ requesting that the Commission forbear from applying Commission rules requiring Embarq to file contract tariffs in areas where the carrier has obtained or may receive Phase I or Phase II pricing flexibility.² In particular, Embarq asks the Commission to forbear from the application of the contract tariff filing requirements in sections 61.55, 61.58, and 69.727(a) of the Commission's rules relating to pricing

¹ 47 U.S.C § 160(c).

² Petition of the Embarq Local Operating Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) from the Contract Tariff Filing Requirements of the Pricing Flexibility Rules, WC Docket No. 07-258, at 2 (filed Oct. 19, 2007)("Petition").

flexibility.³ Forbearance from these sections, however, will not provide Embarq the rights it seeks – to offer contract pricing for price cap services where it has received price flexibility without the use of a tariff - and therefore the petition is procedurally flawed and should be denied. Moreover, Embarq’s petition does not meet the standard of Section 10 of the Act.⁴

Section 69.727(a) – one of the regulatory provision from which Embarq seeks forbearance - provides Embarq pricing flexibility relief. The provision reads as follows:

(a) *Phase I relief.* Upon satisfaction of the Phase I triggers specified in §§69.709(b), 69.711(b), or 69.713(b) for an MSA or the non-MSA parts of a study area, a price cap LEC will be granted the following regulatory relief in that area for the services specified in §§69.709(a), 69.711(a), or 69.713(a), respectively: (1) Volume and term discounts; (2) ***Contract tariff authority...***” (emphasis added).

Embarq can choose not to exercise the regulatory relief granted, it does not need forbearance. The Commission cannot, however, through forbearance *change* the pricing flexibility relief provided, which appears to be what Embarq is seeking. Forbearance is a means to remove an unnecessary provision, not create a new alternative relief never previously adopted.

This is similar to the Commission’s conclusion in the *Fones4All Forbearance Petition*, where the petitioner was seeking forbearance from the rule that restricts local circuit switch unbundling.⁵ The Commission found that such a grant would “simply

³ *Id.* at 2 (citing 47 C.F.R. §§ 61.55, 61.58, 69.7272(a)).

⁴ The Petition is also procedurally flawed because it does not specifically identify the services at issue.

⁵ See *Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End*

create a vacuum rather than confer any rights upon requesting carriers. . .”⁶ The Commission concluded it still had to affirmatively decide to require unbundling.⁷

It appears that Embarq is seeking the ability to offer negotiated contracts, for its price cap special access services, that are not contract tariffs. Such a request, however, does not fall under Section 10 of the Act because what Embarq is seeking is the adoption of a new rule by the Commission, not forbearance from an existing regulatory provision. In other words, had the Commission granted Embarq the authority to offer contracts for these services and separately had a provision requiring those contracts be filed as tariffs, perhaps consideration of forbearance from that separate tariff provision would fall under Section 10 of the Act. But the Commission only provided *contract tariff authority* for these services. Thus, forbearance from the contract tariff provision does not create a right to enter into non-tariffed contracts for the services. The Commission would have to initiate a rulemaking proceeding to adopt a rule providing such regulatory relief.

Even if there were separate provisions that would enable Embarq to seek forbearance solely from the tariff filing aspect of the relief, Embarq has not met its burden under Section 10 of the Act. Prior to granting any relief from any regulation pursuant to Section 10 of the Act, the Commission must determine that (1) enforcement of the provision is not necessary to ensure that the charges, practices, classifications, or

Users Eligible for State or Federal Lifeline Services, Memorandum Opinion and Order, WC Docket No. 05-261, FCC 06-145 (2006)(“Fones4All Forbearance Petition”)[“As an initial matter, we conclude that forbearance from rule 51.319(d) would not give the Petitioner the relief it seeks, and we therefore deny the Petition as procedurally defective.” The Commission found that Fones4All was attempting to use the section 10 forbearance provision to create a new rule.]

⁶ *Id.* at 6.

⁷ *Id.* at 5-6.

regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision is consistent with the public interest. Section 10(b) requires the Commission to consider whether forbearance from enforcing such provision will promote competitive market conditions and enhance competition in making the public interest determination. Thus, the Commission must ensure that its basic telecommunications policy-making processes (including those processes applicable to pricing flexibility) are not undermined.

The tariff filing requirement serves a very important role in serving the public interest. As Embarq acknowledges, “[i]n order to comply with the nondiscrimination provisions of the Act, the Commission has required carriers to make all contract tariffs ‘generally available to similarly situated customers under substantially similar circumstance.’”⁸ Indeed the rules from which Embarq is seeking relief specifically include the requirement that “[b]efore the price cap LEC provides a contract tariffed service, under § 69.727(a), to one of its long-distance affiliates, as described in section 272 of the Communications Act of 1934, as amended, or §64.1903 of the chapter, the price cap LEC certifies to the Commission that it provides service pursuant to that

⁸ Petition at 5 (*citing Access Charge Reform; Price Cap Performance 'Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 69 n. 185 (1999)*).

contract tariff to an unaffiliated customer.”⁹ Tariffs are needed for enforcement – whether agency, customer, or third party initiated - of the pricing regulations. Embarq has not suggested how violations of price regulations would be detected and enforced without tariffs.

Embarq also provides nothing but unsubstantiated theories as to the harms resulting from its tariff filings. For example, Embarq argues that tariffs pose a harm to competition because competitors will “lose any incentive to compete innovatively, and instead they use the price floor established by Embarq to meet or just beat Embarq’s offering.”¹⁰ First, if competitors “meet or just beat Embarq’s offering” Embarq would be establishing a “price ceiling,” not a “price floor.” More importantly, Embarq offers no examples of prices offered by competitors to demonstrate any form of price coordination among carriers or harm to consumers. Moreover, the fact that one carrier knows the price another carrier is offering is not the same as carriers colluding to keep the price at a certain level, so Embarq’s antitrust concerns are unfounded.

Embarq argues that imposing these requirements on a “formerly” dominant carrier unfairly burdens that carrier and begins to harm competition.¹¹ Embarq then cites to Commission findings with regard to non-dominant carriers as justification that it should be relieved of its tariff filing requirement. Embarq, however, has not been found to be a nondominant provider - nor is it even attempting to seek forbearance from dominant carrier rules - for the services at issue in this petition. Commission findings with regard

⁹ 47 CFR §69.727(2).

¹⁰ Petition at 5.

¹¹ Petition at 4.

to the need for non-dominant providers to file tariffs are therefore inapplicable to Embarq for the purpose of these services. While Embarq may not have to meet the standard for classification as a non-dominant carrier in order to be granted forbearance relief, Embarq cannot pretend it is non-dominant, or use findings applicable in non-dominant carrier circumstance, for purpose of obtaining forbearance. It must still demonstrate why – as a dominant carrier – it deserves forbearance.

Embarq's also cites to the Commission findings of competition in the price flexibility orders to argue tariff filings should not be required. Nonetheless, in making those findings the Commission obviously still found that contract tariff filings were necessary to serve the public interests. Embarq's argument for a change in the requirement is that the triggers used to determine pricing flexibility "are under-inclusive, failing to recognize the significant degree of facilities-based competitors." The United States Government Accounting Office ("GAO"), however, found that "data further suggests that there have been some *declines* in competition in wire centers used by incumbents to obtain pricing flexibility."¹² As the GAO pointed out, "the data presented in a price flexibility petition measure potential competition at one point in time and FCC does not revisit or update them, even though competitors may enter bankruptcy or be bought out by another firm."¹³

Besides theories of harm, Embarq only offers evidence of alleged "discussion" that indicate it has lost opportunities to competitors in the past two years and that there are

¹² Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Service*, Report 07-80, at 19 (Nov. 2006) ("GAO Report") (emphasis added)

¹³ GAO Report at 14-15.

lines “at risk.” Embarq would presumably not have been given pricing flexibility unless it faces some competition. Even with this competition the Commission, nevertheless, has found tariff requirements are in the public interest. The Commission cannot allow carriers to use forbearance as a means to eliminate outcomes it disagrees with in a rulemaking proceeding. There is an open rulemaking proceeding through which Embarq can ask the Commission to revisit these issues.

Thus, aside from the fact that the Commission cannot grant Embarq the relief it seeks through a grant of forbearance, as discussed above, Embarq has not demonstrated that it is in the public interest for Embarq to enter into contracts without the requisite tariff filing.

Respectfully submitted,

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